

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

INTELLECTUAL VENTURES I LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 10-1067 (LPS)
)	
CHECK POINT SOFTWARE)	
TECHNOLOGIES LTD., CHECK POINT)	
SOFTWARE TECHNOLOGIES, INC.,)	
MCAFEE, INC., SYMANTEC CORP.,)	
TREND MICRO INCORPORATED, and)	
TREND MICRO, INC. (USA),)	
)	
Defendants.)	
)	
INTELLECTUAL VENTURES I LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 12-1581 (LPS)
)	
)	
TREND MICRO INCORPORATED, and)	
TREND MICRO, INC. (USA),)	
)	
Defendants.)	

**DEFENDANTS' MOTION FOR LEAVE TO SUPPLEMENT THE RECORD
TO ADDRESS RECENTLY DEVELOPED FACTS REGARDING THEIR
MOTION FOR CLARIFICATION OF THE COURT'S CONSTRUCTION OF
"WITHIN THE TELEPHONE NETWORK"**

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I. INTRODUCTION

Defendants respectfully seek leave to supplement the record on Defendants' pending Motion for Clarification (D.I. 437) to make the Court aware of recent testimony provided by Dr. Patrick McDaniel, the infringement and validity expert witness retained by Plaintiff Intellectual Ventures ("IV"). This testimony contradicts assertions IV made in its January 14, 2013 Response in Opposition to Defendants' Motion for Clarification. (D.I. 449) Specifically, in that Response, IV cited to the specification statement that:

In general, the computer data can be screened at any node in the telephone network 10. For example, the computer data can be screened at an end office, a central office, a tandem office, a service switching point, or any other switching office which provides a communication path between the first party and the second party. Alternatively, the computer data can be screened by a remote processor which serves one or more end offices, central offices, tandem offices, service switching points, or other switching offices of the telephone network 10.

D.I. 449 at 8, citing Ex. A, '610 Patent at 2:58-67 (emphasis added by IV).

IV then argued that because the specification teaches that these "switching offices" or "processors" can perform virus screening, a proper construction cannot exclude all gateway nodes. (D.I. 449 at 8-9)

As Defendants noted in their January 25, 2013 Reply Brief in Support of Their Motion for Clarification, IV's argument relies on the bare assertion that these switching offices and processors *are* gateway nodes, an assertion that finds no support anywhere in the record. (D.I. 460 at 6-7) In his recent deposition testimony, IV's expert witness Dr. McDaniel contradicted IV's attorneys' arguments, as he testified that these switching offices and processors *are not* gateway nodes:

Q: So if you look at column 2, all the way at the last paragraph on the –
in column 2, line 56 or so --

A: Uh-huh.

Q: -- you go down to about the third sentence in that paragraph, see it mentions end office, central office, tandem office, service switching point and other switching offices. So is -- I just want to understand. So is an end office a gateway?

* * *

A: Is an end office a gateway, no.

* * *

Q: An end office is not a gateway node?

A: No.

Q: Okay. Is a central office a gateway node?

A: No.

Q: Is a tandem office a gateway node?

* * *

A: No.

* * *

Q: And then how about other switching offices?

A: Well, again, *an office is not a gateway*.

(Ex. B, McDaniel deposition transcript 270:2 – 271:19 (emphasis added).)

Q: In that same paragraph, in column two, it refers to -- well, I can just read it: "Alternatively, the computer data can be screened -- screened by a remote processor, which serves one or more end offices, central offices, tandem offices, service switching points, or other switching offices of the telephone network." The remote processor referred to there, is that a gateway node in your opinion?

* * *

THE WITNESS: No.

* * *

Q: So looking at figure two of the '610 patent, on the left we see a processor that's labeled Element 80. On the right we see another processor that's labeled Element 90. In your opinion, as you have applied the court's claim construction that contains gateway node, are either of those processors in figure two gateway nodes?

* * *

THE WITNESS: No. I don't think so.

(Ex. C, McDaniel deposition transcript 651:20 – 653:13.)

Defendants respectfully ask that the Court take notice of this testimony, which directly contradicts IV's argument that column two of the specification and related figures disclose virus scanning on third-party "gateway nodes." They further request that the Court enter the Proposed Order clarifying the term "within the telephone network" to explicitly incorporate the full scope of the patentees' disclaimer.

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2013, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered participants.

Additionally, I hereby certify that true and correct copies of the foregoing were caused to be served on April 26, 2013, upon the following individuals in the manner indicated:

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